No. 03-753

Supreme Court, U.S.
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In The

Supreme Court of the United States

SKYWALKER COMMUNICATIONS
OF INDIANA, INC.,

Petitioner,

v.

SKYWALKER COMMUNICATIONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent has no parent company and none of its stock is owned by a publicly traded company.

REASONS FOR DENYING THE PETITION

No compelling reasons exist to support this petition. First, even if the Seventh Circuit did not state the applicable standard for dismissing a complaint for failure to state a claim upon which relief may be granted, it explicitly affirmed the district court's dismissal of Petitioner's complaint, which order did specifically cite Fed. R. Civ. P. 12(b)(6) and *Conley v. Gibson*, 355 U.S. 41 (1957). Pet. App. 22a. Second, the Seventh Circuit properly applied relevant state law to the facts of the case, found Petitioner is barred from presenting evidence of the alleged joint venture agreement necessary to prove at least one element of each of the five claims at issue, and properly affirmed the district court's dismissal of the entire complaint. This Court will find insufficient grounds exist here for granting a petition for a writ of certiorari and, thus, Respondent respectfully requests that the Court deny the petition.

I. The Seventh Circuit properly applied the legal standard for dismissing litigation under Rule 12(b)(6).

The Seventh Circuit properly applied relevant law to the facts in affirming the dismissal of Petitioner's contract-based diversity suit as barred by Indiana's statute of frauds. As aptly noted by the district court in its opinion, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Pet. App. 22a (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). The Seventh Circuit followed that logic in stating "the statute [of frauds] works more like a rule of evidence . . . barring any action, however labeled, that turns on proof of an oral promise." (citations omitted). Pet. App. 5a.

Petitioner incorrectly suggests an important issue of federal procedural law has been raised that must be addressed by this Court. Petitioner argues the Seventh Circuit's "unstructured analysis and undisciplined treatment of the issues" is evidenced by the Seventh Circuit's failure "to mention, let alone apply, the legal standard established by this Court for effectuating dismissals under Rule 12(b)(6)". Failure to mention or apply the standard, according to Petitioner, renders the Seventh Circuit's opinion "logically flawed and procedurally erroneous". Finally, Petitioner claims "the application of that standard would have had a dispositive effect on the outcome of this appeal." Pet. App. 6-7.

Petitioner fails to support its claim that an issue of federal procedural law has been raised with citation to any rule of law or authority. Petitioner also fails to explain what dispositive effect application of the standard would have had on the outcome of the appeal. The logical conclusion of that argument is that if the Seventh Circuit had applied the legal standard properly it would have reversed the district court's order dismissing the complaint in its entirety. Yet, that argument falls far short of a compelling reason to grant a petition for writ of certiorari.

II. The Seventh Circuit properly dismissed Skywalker-Indiana's Complaint in its entirety.

"The substance of an action, rather than its form, controls whether a particular statute has application in a particular lawsuit." *Ohio Valley Plastics, Inc. v. National City Bank,* 687 N.E.2d 260, 263 (Ind.App. 1997). Whether the present cause of action is labeled as a breach of contract, tortious interference with contract relations, criminal

mischief, criminal conversion, fraud or promissory estoppel, its substance is that of an action upon an agreement not to be performed within one year. Therefore, the statute of frauds applies to bar proof of an oral promise.

In the district court the original motion to dismiss was denied. Two years later, on the eve of trial, Respondent brought a motion in limine asking the court to bar proof of the alleged oral joint venture agreement. The motion in limine was then resubmitted to the court as a reconsideration of the motion to dismiss and was granted. The statute of frauds applies in this case as a rule of evidence and applies to each count brought against Respondent regardless of the label of each action.

If Petitioner is allowed to pursue the secondary claims argued, the contest would then concern the credibility of the evidence of the unenforceable oral agreement, which is precisely what the statute of frauds seeks to avoid. *See, Whiteco Industries, Inc. v. Kopani*, 514 N.E.2d 840 (Ind.App. 1987).

All of Skywalker-Indiana's claims are fatally premised upon the existence of a joint venture agreement between the parties. An element of tortious interference with contract is the absence of justification, which cannot be proven independent of the alleged joint venture agreement. An element of constructive fraud is deceit, which again cannot be proven without reference to the unenforceable agreement. Criminal mischief and criminal conversion claims require proof of deception and intentional exertion of control over another's property, which cannot be proven absent evidence of the alleged joint venture agreement. None of the cases Petitioner cites to support these claims involves a statute of frauds defense.

The Seventh Circuit properly held the doctrine of promissory estoppel will not remove the alleged joint venture agreement from operation of the statute of frauds. Skywalker-Indiana could show only expenditures on advertising, inventory, and dealership development as its alleged "reliance" on the joint venture agreement. The Seventh Circuit found this evidence falls short of a reliance injury so substantial and independent as to constitute an unjust and unconscionable injury and loss sufficient to remove the claim from the operation of the statute of frauds. *See, Brown v. Branch,* 758 N.E.2d 48 (Ind. 2001); *Whiteco Indus. v. Kopani*, 514 N.E.2d 840. Accordingly, the Complaint was properly dismissed in its entirety.

CONCLUSION

The Seventh Circuit correctly decided Petitioner could prove no set of facts which would entitle it to relief. Accordingly, Respondent respectfully requests this Court deny the Petition.

Respectfully submitted,

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